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Aviation Security Law

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Preface

Aviation is an important global business and a significant driver of the global economy. It is vital, therefore, that stringent measures are taken to counter acts of unlawful interference with civil aviation. The *Convention on International Civil Aviation* signed at Chicago on 7 December 1944, states in its *Preamble* that whereas the development of civil aviation may help preserve friendship and understanding among the people of the world, yet, its abuse could become a threat to general security.

The genealogy of the term “Terrorism” lies in Latin terminology meaning “to cause to tremble” (*terrere*). Since the catastrophic events of 11 September 2001, we have seen stringent legal measures taken by the United States to attack terrorism, not just curb it. The famous phrase “war on terror” denotes pre-emptive and preventive strikes carried out through applicable provisions of legitimately adopted provisions of legislation. The earliest example is the *Air Transportation Safety and System Stabilization Act (ATSAA)* enacted by President Bush less than two months after the 9/11 attacks. Then, two months after the attacks, in November 2001, Congress passed the *Aviation and Transportation Security Act (ATSA)* with a view to improving security and closing the security loopholes which existed on that fateful day in September 2001. The legislation paved the way for a huge federal body called the Transportation Security Administration (TSA) which was established within the Department of Transportation. The Homeland Security Act of 2002 which followed effected a significant reorganization of the Federal Government.

All this goes to show that the law plays a significant role in ensuring aviation security. This book addresses new and emerging threats to civil aviation; evaluates security tools now in use such as the Public Key Directory, Advance Passenger Information, Passenger Name Record and Machine Readable travel documents in the context of their legal and regulatory background; and discusses applicable security treaties while providing an insight into the process of the security audits conducted by the International Civil Aviation Organization (ICAO).

The book also examines issues of legal responsibility of States and individuals for terrorist acts of third parties against civil aviation and discusses from a legal perspective the latest liability Conventions adopted at ICAO. The Conclusion of the book provides an insight into the application of legal principles through risk management. Since the writing of this book, the author published three feature articles entitled, The NW Flight 253 and the Global Framework of Aviation Security (*Air and Space Law*, Volume 35 Issue 2 April 2010 167–182); The Use of Full Body Scanners and Their Legal Implications; and The Use of Forged Passports for Acts of Criminality (both of which could be accessed through the web page of the *Journal of Transportation Security* (Springer)). These three articles form a useful adjunct to this book.

Montreal, CA

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Chapter 1

A Security Culture

A. A Risk-Based Approach

Since the events of 11 September 2001, there have been several attempts against the security of aircraft in flight. These threats have ranged from shoe bombs to dirty bombs to explosives that can be assembled in flight with liquids, aerosols and gels. In every instance the global community has reacted with pre-emptive and preventive measures which prohibit any material on board which might seemingly endanger the safety of flight. Some jurisdictions have even gone to extremes in prohibiting human breast milk and prescriptive medications on board.

New and emerging threats to civil aviation are a constant cause for concern to the aviation community. Grave threats such as those posed by the carriage of dangerous pathogens on board, the use of cyber technology calculated to interfere with air navigation systems, and the misuse of man-portable air defence systems are real and have to be addressed with vigour and regularity. The International Civil Aviation Organization has been addressing these threats for some time and continues to do so on a global basis.

Since the events of 11 September 2001 took place, the most critical challenge facing international civil aviation remains to be the compelling need to ensure that the air transport industry remains continuous and its consumer is assured of sustained regular, safe and secure air transport services. The Air Transport Association (ATA), in its 2002 State of the United States Airline Industry Statement, advised that, in the United States, the combined impact of the 2001 economic downturn and the precipitous decline in air travel following the 11 September 2001 attacks on the United States resulted in devastating losses for the airline industry which are likely to exceed \$7 billion and continue through 2002.¹ Of course, the overall picture, which portended a certain inevitable gloom for the air transport industry, was not the exclusive legacy of United States' carriers. It applied

¹State of the United States Airline Industry, *A Report on Recent Trends for United States Carriers*, Air Transport Association: 2002, Statement by Carol B. Hallett, President and CEO, ATA.

worldwide, as was seen in the abrupt downfall of air traffic globally during 2001. The retaliation by the world community against terrorism, which is an ongoing feature in world affairs, increased the airline passenger's fear and reluctance to use air transport. In most instances in commercial aircraft purchasing, air carriers cancelled or postponed their new aircraft requisition orders. Many carriers, particularly in developing countries, were seen revisiting their cost structures and downsizing their human resource bases. It is incontrovertible that another similar event or series of events will inevitably plunge the aviation industry into similar despair and destitution.

In order to arrive at where we are at the present time with regard to the results of the global measures taken by the International Civil Aviation Organization (ICAO), it is necessary to discuss the various steps taken from a regulatory perspective by ICAO in its role as regulator and mentor of international civil aviation, in counter-ing imminent threats posed to the sustainability of the air transport industry.

B. The ICAO Response

I. The ICAO High-Level Ministerial Conference

At the 33rd Session of the Assembly, held from 25 September to 5 October 2001, ICAO adopted Resolution A33-1 entitled "Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation".² This Resolution, while singling out for consideration the terrorist acts which occurred in the United States on 11 September 2001, and, *inter alia*, recognizing that the new type of threat posed by terrorist organizations requires new concerted efforts and policies of cooperation on the part of States, urged all Contracting States to intensify their efforts in order to achieve the full implementation and enforcement of the multilateral conventions on aviation security, as well as of the ICAO Standards and Recommended Practices and Procedures (SARPs) relating to aviation security, to monitor such implementation, and to take within their territories appropriate additional security measures commensurate to the level of threat in order to prevent and eradicate terrorist acts involving civil aviation. The Resolution also urged all Contracting States to make contributions in the form of financial or human resources to ICAO's aviation security mechanism to support and strengthen the combat against terrorism and unlawful interference in civil aviation; called on Contracting States to agree on special funding for urgent action by ICAO in the field of aviation security; and directed the Council to develop proposals and take

²*Assembly Resolutions in Force* (as of 5 October 2001), ICAO Doc 9790, at p. VII-1. Also of general interest is UN General Assembly Resolution 56/88, *Measures to Eliminate International Terrorism*, adopted at the 56th Session of the United Nations which calls upon States to take every possible measure in eliminating international terrorism. See A/RES/56/88, 24 January 2002.

appropriate decisions for a more stable funding of ICAO action in the field of aviation security, including appropriate remedial action.

Resolution A33-1 also directed the Council to convene, at the earliest date, an international high-level, ministerial conference on aviation security in Montreal with the objectives of preventing, combating and eradicating acts of terrorism involving civil aviation; of strengthening ICAO's role in the adoption of SARPs in the field of security and the audit of their implementation; and of ensuring the necessary financial means to strengthen ICAO's AVSEC Mechanism, while providing special funding for urgent action by ICAO in the field of aviation security.

On 19 and 20 February 2002, in keeping with the requirement of Assembly Resolution A33-a high level ministerial conference on aviation security was held in the Headquarters of the International Civil Aviation Organization, Montreal. In the words of Dr. Assad Kotaite, President of the ICAO Council who opened the Conference (and later served as the Chairman of the Conference), the Conference was being held "...at a critical juncture for civil aviation and for society at large ... and would review and develop global strategy for strengthening aviation security with the aim of protecting lives both in the air and on the ground, restoring public confidence in air travel and promoting the health of air transport in order that it can renew its vital contribution to the world economy..."³ Dr. Kotaite stated that this was a historic moment in the evolution of civil aviation.

At this Conference, attended by Member States of the International Civil Aviation Organization, Some 714 participants from 154 Contracting States and observers from 24 international civil aviation organizations endorsed a global strategy for strengthening aviation security worldwide and issued a public declaration at the conclusion of their two-day meeting.

The High Level Ministerial Conference came to several conclusions and adopted numerous recommendations containing guidance for follow up action. The Conference concluded that the events of 11 September 2001 have had a major negative impact on world economies and an impact on air transport which is unparalleled in history and restoration of consumer confidence in air transport and assurance of the long-term health of the air transport industry are both vital, and many States have already initiated a range of measures to this effect. It was also the view of the Conference that the effective application of enhanced uniform security measures, commensurate with the threat, will help to restore confidence in air transport, but these measures will need to be passenger and cargo user-friendly and not overly costly for the industry and its consumers if traffic growth is to be regenerated. Accordingly, the Conference recommended that consistent with Assembly Resolution A33-1, States should intensify their efforts to achieve the full implementation and enforcement of the multilateral conventions on aviation security as well as of the ICAO Standards and Recommended Practices (SARPs) relating to aviation security and take within their territories appropriate additional security measures

³ICAO News Release *PIO 02/2002*.

which are commensurate with the level of threat and are cost effective. Since restoration of confidence in air transport is a collective responsibility, the Conference called upon States to enhance international cooperation in aviation security and assist developing countries to the extent possible.

With regard to the compelling need to strengthen aviation security worldwide, the Conference concluded that a strong and viable aviation security (AVSEC) programme was indispensable and that a global uniform approach to the implementation of the international aviation security standards is essential, while leaving room for operational flexibility. It was also considered useful to establish regional and sub-regional approaches which could make a significant contribution to ICAO's aviation security activities. The Conference concluded that aviation security was a responsibility of Contracting States, and States which outsource aviation security programmes should therefore ensure that adequate governmental control and supervision are in place. The Conference also observed that, since gaps and inadequacies appear to exist in international aviation security instruments with regard to new and emerging threats to civil aviation, further study was needed in this regard. There was a need for a comprehensive ICAO *Aviation Security Plan of Action* for strengthening aviation security, through a reinforced AVSEC mechanism, an ICAO aviation security audit programme, technical cooperation projects, promotion of aviation security quality control functions and appropriate performance indicators.

Based on the above conclusions the Conference recommended that States take immediate action to lock flight deck doors for aircraft operated internationally, while maintaining measures on the ground to provide the highest level of aviation security. States were also requested to actively share threat information in accordance with Standards in Annex 17 and employ suitable threat assessment and risk management methodologies appropriate to their circumstances, based on a template to be developed by ICAO and ensure that aviation security measures are implemented in an objective and non-discriminatory manner.

As for ICAO's role in this process, the Conference recommended that the Organization develop, as a matter of high priority, amendments to the appropriate Annexes to require protection of the flight deck door from forcible intrusion; continue its efforts to identify and analyze the new and emerging threats to civil aviation with the purpose of assisting in the development of security measures and to actively collaborate with other associated agencies; carry out a detailed study of the adequacy of the existing aviation security conventions and other aviation security-related documentation with a view to proposing and developing measures to close the existing gaps and remove the inadequacies, including amendment where required, so as to deal effectively with the existing, as well as the new and emerging, threats to international civil aviation; develop and take action to deal with the problem of aviation war risk insurance; and develop and implement a comprehensive *Aviation Security Plan of Action* and any additional actions approved by the Council, including a clear identification of priorities.

One of the key conclusions of the Conference was that, in order to further enhance safety and security and to ensure the systematic implementation of the

critical elements of a State's aviation security system, there was an urgent need for a comprehensive ICAO programme of aviation security audits and that such a programme should audit national level and airport level compliance with Annex 17 and with aviation security related provisions of other Annexes on a regular, mandatory, systematic and harmonized basis. It was the view of the Conference that the ability to determine whether an airport or State is in compliance will require that auditors have a solid aviation security background and be sufficiently trained and certified by ICAO to ensure that auditing is conducted in a consistent and objective manner. The Conference was strongly convinced that such an audit programme should be undertaken under the auspices of ICAO's AVSEC Mechanism which could be guided by proven and successful concepts used in viable programmes already developed by the European Civil Aviation Conference (ECAC), the United States and other States in the development of the framework for a security audit programme.

It was considered that the regional approach would have many benefits and was to be considered as supplementary to local initiatives, in particular by promoting regional partnership and the activities of the ICAO Regional AVSEC Training Centres. The AVSEC Panel, which is an instrumentality of the ICAO Council should assist in the development of technical requirements and guidance materials needed to administer the audits and assist in the development of an effective quality assurance programme to maintain standards of audit performance; and since an audit programme could provide only security levels of audited airports at the time of the audit, a permanent mechanism based on quality control and the regular conduct of exercises and inspections could guarantee the continuity and improvement of security levels determined by the audits.

Arguably, the most significant and seminal recommendation of the Conference was that ICAO establish a comprehensive programme of a universal, regular, mandatory, systematic and harmonized aviation security audits, with implementation beginning in 2003 based on the final work plan established by the Council. It was also decided that, in order to be effective, the programme should be based on an audit process that uses ICAO trained and certified audit teams which are headed by an ICAO staff member and which consistently apply fair and objective methods to determine compliance with Annex 17 by observing measures at airports and assessing the State's capabilities to sustain those measures.

The Conference was of the view that of singular importance to the audit process was the need for the audit programme to be established under the auspices of ICAO's AVSEC Mechanism. It recommended that, in developing the audit programme, which should be transparent and autonomous, ICAO should ensure the greatest possible coordination and coherence with audit programmes already established at a regional or sub-regional level, taking into account aviation security situation in these States. For this to be a reality, a compliance mechanism has to be built into the programme, which will delineate between minor and serious areas of improvement, ensure that immediate corrective action is taken for serious deficiencies and provide to developing States the necessary assistance to measurably improve security.

With regard to funding an aviation security audit programme to be run by ICAO, an adequate and stable source of funding was to be sought for the AVSEC Mechanism through increased voluntary contributions until such time that an allocation of funds can be sought through the Regular Programme Budget, which was envisioned to be as soon as possible. It was recommended that all States be notified of a completed audit, that ICAO Headquarters be the repository for full audit reports and that the sharing of audit reports between States take place on a bilateral or multilateral basis. States were required, under such a programme, to commit to provide ICAO with national AVSEC findings based on a harmonized procedure to be developed by ICAO as early as possible. Of course, those States – in particular developing countries – should be provided with technical and financial assistance under technical cooperation, so that they may take remedial actions to rectify the deficiencies identified during the audit. States should also utilize the ICAO audits to the maximum extent possible and could always approach ICAO with regard to the audit findings for other States.

The Conference also concluded that, in order to execute the ICAO *Aviation Security Plan of Action*, an indicative additional funding requirement was for a minimum of US \$15.4 million through voluntary contributions for the current triennium 2002–2003–2004, these figures to be used as a basis for further study by the Council. However, for the longer term a more stable means of funding the ICAO *Aviation Security Plan of Action* would be either through an increase of the assessment to the ICAO General Fund for the following triennia, or by a long-term commitment, on a voluntary basis, of systematic contributions according to an approved suggested level of contribution, to be determined by the Council, by all States. With regard to recouping policies of States, the Conference observed and confirmed that ICAO's policy and guidance material on cost recovery of security services at airports in *ICAO's Policies on Charges for Airports and Air Navigation Services* (Doc 9082/6) and the *Airport Economics Manual* (Doc 9562) remained valid, although there was a need for development of additional policy and guidance material on cost recovery of security measures with regard to air navigation services complementary to that which already exists with respect to airport security charges. There was also a need for further improvement of human resources, utilizing the existing training centres and the standardization of instruction materials, where appropriate based on ICAO's TRAINAIR methodology.

On the above basis, States were called upon by the Conference to commit to provide adequate resources, financial, human and/or otherwise in kind, for the time being on a voluntary basis through the AVSEC Mechanism, for the ICAO *Aviation Security Plan of Action* for the triennium 2002–2003–2004 as a matter of priority, and be aware of the continuing needs for subsequent triennia. They were also called upon to agree to remove the existing ties they individually imposed on the expenditures of AVSEC Mechanism contributions in order for ICAO to immediately utilize all funds available in the AVSEC Mechanism Trust Funds. The Conference observed that States might wish to use the Technical Co-operation Programme of ICAO as one of the main instruments to obtain assistance in advancing implementation of their obligations under relevant international conventions, Standards and